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YEE TECK FAH v. WORTHY BUILDERS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
NADZARIN WOK NORDIN JC
[COMPANIES WINDING-UP NO: WA-28NCC-359-05-2020]
2 DECEMBER 2020

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COMPANY LAW: *Suit by company – Solicitor – Appointment – Appointment without formal board resolution – One of directors bankrupt – Warrant to act on behalf of company – Warrant to act not executed by majority of directors – Whether in accordance with Companies Act 1965 and articles of association – Whether warrant to act constitutes resolution in writing – Whether board of directors duly authorised to appoint solicitor – Whether separate acts of executing notice of appointment of solicitors and warrant to act by different directors amounted to unanimous appointment of solicitor by board of directors – Companies Act 1965, ss. 122(1) & 131B*

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The respondent was a company incorporated under the Companies Act 1965 ('CA 1965'), with only two directors, namely one Lee Cheng Meng ('Lee') and one Lim Fong Len ('Lim'). *Vide* a bankruptcy proceeding at the High Court, Lee was adjudged a bankrupt on 29 July 2020. The petitioner filed a winding-up petition at this court against the respondent for an amount due and owing under a court order obtained by the petitioner against the respondent at the Magistrate's Court ('petition'). Subsequent to the petition, the petitioner on 18 August 2020 *via* encl. 10, sought to amend the petition and in turn, solicitors purporting to act on behalf of the respondent, Messrs NK Menon & Associates ('solicitors'), filed a notice of appointment of solicitors dated 1 September 2020 ('notice of appointment') and an affidavit-in-reply executed and affirmed respectively by Lim to oppose encl. 10. The petitioner then gave a notice to the respondent's solicitors of their preliminary objection. The grounds relied on by the petitioner, *inter alia*, were the following: (i) since Lee had been declared bankrupt, he was disqualified from being a director and could not, directly or indirectly, take part in the management of the respondent, resulting in the number of directors of the respondent to fall below the minimum threshold of two directors as required under the CA 1965 and the respondent's articles of association ('AA'); and (ii) therefore, the respondent was not legally competent to pass any resolution to appoint the solicitors to act on its behalf or to pursue the petition at the time the notice of appointment was filed. The preliminary objection raised formed the basis of the petitioner's current action under encl. 20 to resist the respondent's application. The petitioner applied pursuant to ss. 122(1) and 131B of the CA 1965 and/or the inherent powers of the court for an order in the following terms: (i) a declaration that the solicitors had not been duly authorised by the respondent to act on its

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behalf; and (ii) a declaration that all actions taken by the solicitors purportedly for and on behalf of the respondent in this petition were null and void. In challenging the application in encl. 20, the respondent principally claimed that: (i) the fact that a warrant to act had been signed by Lee, and, a notice of appointment had been executed by Lim, meant that there was a unanimous appointment of the solicitors by the board of directors of the respondent; and (ii) Lee had received a sanction dated 8 September 2020 from the Insolvency Department of Malaysia ('JIM') to continue to act as a director of the respondent. Hence, the respondent was duly authorised in appointing the solicitors.

Held (allowing application in encl. 20):

(1) Since the respondent is a company incorporated under the CA 1965, it is trite that the provisions of the said Act are applicable to it and its AA as its constitution. Pursuant to arts. 72(b), 73, 79 and 83 of the AA and s. 122(1) of the CA 1965, it is mandatory for the respondent to adhere to the requirement of two directors in a company and to manage its affairs in accordance with its AA. Moreover, nowhere in the sanction was it mentioned as to its effective date or that it commenced as to any date that had been backdated. Thus, the sanction did not have any retrospective effect and was effective only from the date of the letter from JIM, 8 September 2020. Considering that: (i) Lee was already a bankrupt as at 29 July 2020; and (ii) the sanction given by JIM to Lee to continue to act as a director of the respondent was yet to be effective, as at the date Lim executed the notice of appointment, the appointment of the solicitors was without a formal board resolution. (paras 2, 11, 13-15, 25 & 26)

(2) For the appointment of the solicitors to constitute a resolution of the respondent, even if informally done, *ie*, without a formal written resolution, it should be done (i) in writing; and (ii) signed or executed by both of the respondent's directors, in accordance with the respondent's AA. Since the warrant to act was not signed by both directors, it could not be construed as a resolution in writing and in turn, the respondent's application was unauthorised. The solicitors thus had not been duly authorised to act on behalf of the respondent and all action taken by the solicitors, purportedly for and on behalf of the respondent in the petition, were null and void. The separate acts of Lee signing the warrant to act and Lim executing the notice of appointment therefore did not tantamount to a unanimous appointment of the solicitors by the board of directors of the respondent. (paras 28-30)

A **Case(s) referred to:**
Baldev Singh v. Mahima Singh & Ors [1974] 1 LNS 13 HC ***(refd)***
Syawal Enterprise Sdn Bhd & Anor v. Dayadiri Sdn Bhd [1990] 2 CLJ 297; [1990] 3 CLJ (Rep) 165 HC ***(refd)***
UEM Genisys Sdn Bhd v. Shimizu Corporation & Anor [2003] 6 CLJ 422 HC ***(refd)***
Ulimas Sdn Bhd v. Hi-Summit Construction Sdn Bhd & Other Appeals [2017] 2 CLJ 636 FC ***(dist)***
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Legislation referred to:
Companies Act 1965 (repealed), ss. 122(1), 131B
Insolvency Act 1967, s. 38(1)(d)

C **Other source(s) referred to:**
Gore-Browne on Companies, 43rd edn, para 26-3

For the petitioner - Yee Teck Fah & Ong Gek Lin; M/s Yee Teck Fah & Co
For the respondent - Oommen Koshy; M/s NK Menon & Assocs

Reported by Syamim Ariffin

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JUDGMENT
(encls. 1, 10 & 20)

Nadzarin Wok Nordin JC:

Introduction

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[1] In the application under encl. 20 ("application") before this court, the petitioner Yee Teck Fah t/a Yee Teck Fah & Co ("petitioner") is applying pursuant to ss. 122(1) and 131B of the Companies Act 1965 and/or the inherent powers of the court for an order *inter alia* in the following terms:

F (i) a declaration that Messrs NK Menon & Associates ("solicitors") had not been duly authorised by the respondent to act on its behalf; and

(ii) a declaration that all action taken by the solicitors purportedly for and on behalf of the respondent in this petition are null and void.

G **[2]** The grounds of the application are briefly as follows:

(i) the respondent is a company incorporated under the Companies Act 1965 ("CA 1965") and must have at least two directors under s. 122(1) the CA 1965 and under s. 131B of the CA 1965 the business and affairs of a company must be managed by or under the direction of the board
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(ii) a Suruhanjaya Syarikat Malaysia ("SSM") search conducted on the respondent on 1 September 2020 shows that it has only two directors namely one Lee Cheng Meng ("Lee") and one Lim Fong Len ("Lim");

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(iii) Lee was declared a bankrupt on 29 July 2020 *vide* Bankruptcy No. BA-29NCC-7503-12-2019 at the Shah Alam High Court and as a result of which Lee is disqualified from being a director of a company and cannot directly or indirectly take part in the management of any company under s. 38(1)(d) of the Insolvency Act 1967;

(iv) consequently, the number of directors of the respondent fell below the minimum two directors as required under s. 122(1) the CA 1965;

(v) under the CA 1965, a one man director in Board of Director does not have power to act as a competent and properly constituted Board of Directors and lacks the necessary *locus standi* and is not legally competent to pass any resolution to appoint solicitors to act for the company or pursue any legal proceedings. Such resolution passed to appoint solicitors to act for the company or pursue any legal proceedings would not only be invalid but also illegal; and

(vi) given that the notice of application dated 18 August 2020 under encl. 10 ("encl. 10") was filed on 18 August 2020 after Lee was declared a bankrupt, and after the number of directors of the respondent has been reduced to one which lacks the necessary *locus standi* and not legally competent to pass any resolution to appoint the solicitors to act for the respondent or pursue the petition herein such resolution would not only be invalid but also illegal.

Background Facts

[3] A winding-up petition ("petition") was filed by the petitioner against the respondent on 12 May 2020 for the sum of RM48,091.09 being the amount due and owing under a court order dated 28 February 2020 obtained by the petitioner against the respondent *vide* a Shah Alam Magistrate's Court Suit No. BA-A72NCVC-2769-11-2019.

[4] By way of encl. 10 the petitioner had sought to amend the petition and the solicitors had subsequently filed a notice of appointment of solicitors on 1 September 2020 ("notice of appointment") *vide* encl. 13 purportedly being appointed to act by the respondent as the solicitors for the respondent, as well as filing an affidavit in reply to oppose encl. 10 which was affirmed by Lim on 1 September 2020.

[5] By way of a letter dated 1 September 2020 the petitioner's solicitors had then given notice to the solicitors of their preliminary objection to the solicitors acting for the respondent on the aforesaid grounds which are contained in the application and had further challenged the solicitors to produce a valid board resolution from the respondent authorising them to act for the respondent in the event the solicitors disputed the petitioner's solicitors' assertion.

[6] The application herein was thereafter filed on 3 September 2020 and the same together with encl. 10 was then fixed to be heard by this court on 18 September 2020 wherein the petitioner's solicitor and the solicitors' respective counsels had orally submitted on the application.

Solicitors' Contention

[7] It was submitted by the solicitors that they were duly authorised to act for and on behalf of the respondent and produced a warrant to act dated 25 May 2020 ("warrant to act") signed by Lee, which can be found at exh. A1 of the respondent's affidavit affirmed on 17 September 2020 at encl. 24. The solicitors had contended that since Lee had signed the warrant to Act and Lim had executed the notice of appointment, there was unanimous appointment by the board of the respondent company.

[8] The solicitors also contended that the petitioner had made factual allegations which were not points of law and as there was no affidavit, they did not have the opportunity to respond to the said allegations.

[9] It was also submitted by the solicitors that Lee had received a sanction from the Jabatan Insolvensi Malaysia ("JIM") to continue to act as a director of the respondent ("sanction").

[10] The solicitors further submit that the company resolution requested by the petitioner is only a form and the intent of the directors of the respondent was clear, in that they had intended to appoint the said solicitors and it was alleged that the petitioner was intending to finish off the respondent by not allowing the respondent to defend the petition in the manner of the application filed before this court.

Court's Findings And Decision

[11] It is undisputed that the respondent is a company incorporated under the CA 1965 and accordingly the provisions in the CA 1965 are applicable to the respondent. It is also trite that the Articles of Association of a company is thus the constitution of the company: *Baldev Singh v. Mahima Singh & Ors* [1974] 1 LNS 13; [1974] 1 MLRH 159.

[12] This court was referred to the articles of association of the company as attached in the petitioner's written submission with respect to the application. This articles of association of the respondent company was not exhibited in any affidavit before this court and in normal circumstances, the court would not accept the same and consider the same as being a statement from the bar. However, in the matter before me, the solicitors' counsel had not taken objection to the same and I have resultantly taken the liberty to examine the said articles as attached in the petitioner's written submission.

[13] A perusal of art. 72(b), states that the office of director shall become vacant if the director becomes bankrupt, whilst under art. 73 which relates to the powers and duties of directors, the same reads:

> The business of the company shall be managed by the directors who may pay all expenses incurred in promoting and registering the company, and may exercise all such powers of the company as are not, by the Act or by these regulations, required to be exercised by the company in general meeting, subject, nevertheless, to any of these regulations, to the provisions of the Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

[14] I have considered the respective counsels' submissions and find that this court accepts the argument that art. 73 as aforementioned does in fact state that the business of the company shall be managed by the "directors" as opposed to the usage of the word "director" which denotes that there must be more than one director managing the business of the respondent company and that this requirement is also reinforced by arts. 79 and 83 respectively where the word "director" appear *vis a vis* that the directors may meet together for the despatch of business in the former and in the latter which reads:

> The quorum necessary for the transaction of the business of the directors may be fixed by the directors, and unless so fixed shall be two.

[15] It is also expressly provided under the CA 1965 that under s. 122(1) CA 1965, "Every company shall have at least two directors". This court holds that the requirement of two directors in a company, based on the CA 1965, and the articles as mentioned, is therefore mandatory for the respondent herein to manage the affairs of the respondent company including but not limited to exercise all such powers of the company under the articles.

[16] Following from the same, this court has viewed the High Court case of *UEM Genisys Sdn Bhd v. Shimizu Corporation & Anor* [2003] 6 CLJ 422; [2003] MLJU 179 and the Federal Court case of *Ulimas Sdn Bhd v. Hi-Summit Construction Sdn Bhd & Other Appeals* [2017] 2 CLJ 636 which were cited by the respective counsels.

[17] In *UEM Genisys Sdn Bhd* (*supra*), His Lordship Abdul Malik Ishak J (as he then was) had to decide on the issue of whether the firm of solicitors therein had been duly and lawfully appointed and authorised by the plaintiff's company to institute the legal proceedings on its behalf and had in his judgment referred to *Gore-Browne on Companies*, 43rd edn where, at para. 26-3, the learned author wrote:

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> Each director has not alone power to bind the company unless he has had this power specially delegated to him. Nor can a number of the directors, even although they constitute a majority, act without meeting or at a meeting of which notice has not been given to the whole body, and acts done by the majority of board not duly convened as a board meeting (eg on the occasion of a general meeting of the company) are not valid.

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[18] In that case, it was found that neither the solicitors nor Seow (the Chief Executive Officer) therein in particular, had been able to produce a resolution of the Board of Directors of the plaintiff authorising the appointment of the solicitors by the Chief Executive Officer and the institution of this civil suit in the plaintiff's name, wherein the court held that

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the burden of proving that that civil suit had been instituted by the solicitors with proper authority rests on the plaintiff's company and quoted VC George J (as he then was) said in *Syawal Enterprise Sdn Bhd & Anor v. Dayadiri Sdn Bhd* [1990] 2 CLJ 297; [1990] 3 CLJ (Rep) 165, p. 167:

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> The lack of authority of the solicitors to act can be challenged at any stage of the proceedings – see *Simmons v. Liberal Opinion Ltd* [1911] 1 KB 966 followed in *Re L.Y. Swee & Co. Ltd* [1968] 2 MLJ 104 at 107 and in *Chin Kok Kwong Const. Sdn. Bhd. v. Sunrise Towers Sdn. Bhd.* [1986] 2 MLJ 41 at 42. The challenge having been made the burden of proving that the suit had been instituted with proper authority rests on the plaintiff company. See *United Investment & Finance Ltd v. Tee Chin Yong & Ors* [1967] 1 MLJ 31 at 35.

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[19] The court in *UEM Genisys Sdn Bhd* (*supra*) then went on to hold that:

> ... the current civil suit must be held to be a nullity since it flows from the lack of authority on the part of Seow to appoint and instruct GTRZ (the solicitors) to institute the present proceedings. In my judgment, the present civil suit was not "properly constituted".

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[20] I now turn to the Federal Court case of *Ulimas Sdn Bhd* (*supra*) where during the hearing of the case, counsel for the appellants orally and without prior notice, raised a preliminary objection by asserting that the firm acting

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on behalf of the respondent lacked authority to act in the suit. The Federal Court had held amongst others that:

(i) the courts have always refrained from interfering with the internal management of the company. Similarly, when dealing with the authority to commence legal proceedings, it was absurd for the court to go behind the written warrant to act as the Board could always ratify any action commenced without proper authority. To require the court to go behind a warrant to act and investigate the internal management of a corporate litigant would be an affront to the fundamental principles of company law and the proper administration of justice;

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(ii) section 131B of the CA 1965 provides that the power of management in a company rests solely in the hands of the Board of Directors. The respondent's Board of Directors had, in fact, made a decision to commence and continue with the suit. This was evident by the warrant to act signed by two out of three directors and was further supported by the conduct of the third director in assenting to the commencement and continuation of the suit even though he did not sign the warrant to act. Initially, he was a co-plaintiff in the suit. In the circumstances, there was unanimous assent by all the directors of the respondent for the commencement of the suit and continuation of the same. (paras 13, 14, 16 & 19); and

(iii) there was no provision in the CA 1965 stipulating that a formal board resolution was required in order for a company to appoint solicitors. Although the warrant to act did not carry with it the formalities of a written resolution, the contents and intention expressed were clear to constitute a decision or a resolution in writing made pursuant to art. 109 of the respondent's article of association. The warrant to act may, in the circumstances, be construed as a resolution in writing under art. 109. As such, the suit was duly authorised by the Board.

[21] This court is fully minded of the *ratio* in the *Ulimas Sdn Bhd* (*supra*) in particular on the issue of a formal board resolution not being required in order for a company to appoint solicitors, but this court notes that one of the main issues raised by the Federal Court therein had related to "... the need for a substantive application to be made to challenge the right of counsel to act" and that "the learned judge should have stayed the proceedings upon the challenge being made by the appellants' counsel. This is to enable the respondent to obtain the formal resolution of the Board". In the matter before me, I had on 2 September 2020 ruled, after being presented with the said case law authority, that the petitioner had to file a formal written application to challenge the solicitors' right to represent the respondent which has since been done by the petitioner which resulted in the application herein.

[22] It is also this court's observation that further to the ruling made by this court on 2 September 2020 and even after the application was filed, there appears to be no formal resolution from the respondent to rectify the solicitors' appointment in the petition herein save that the respondent has attempted to rely on the warrant to act dated 20 May 2020 which was only filed on 17 September 2020 and the solicitors' counsels submission that since Lee had signed the warrant to act and Lim had executed the notice of appointment, there was unanimous appointment by the board of the respondent company.

[23] As to the warrant to act itself, I have taken note of exh. R1 of the affidavit in opposition at encl. 16 which was referred to by the petitioner's solicitors to assert that the letter dated 11 August 2020 from Messrs Ismail, Shahidan & Farah addressed to the petitioner's solicitors is evidence that the warrant to act to the solicitors could not have been executed on 20 May 2020.

[24] I find that the letter dated 11 August 2020 from Messrs Ismail, Shahidan & Farah relates to the Magistrate's Court Suit No. BA-A72NCVC-2769-11-2019 as seen in the heading of the said letter and that the payment made in paras. 2 and 3 of that letter with regards the petition herein does not as a matter of evidence show that the said warrant to act had not been executed on 20 May 2020. I am therefore on the strength of that sole evidence mentioned, unable to accept that the warrant to act was not in fact executed on 20 May 2020.

[25] On the sanction, the court has examined exh. A2 of encl. 24 wherein the said sanction was exhibited and find that the sanction was dated 8 September 2020. A reading of the said sanction from JIM shows that the sanction which is addressed to Lee, states at para. 2 of the same (in Bahasa Malaysia): "Adalah dimaklumkan bahawa permohonan tuan untuk memegang jawatan sebagai pengarah di Worthy Builders Sdn Bhd ... telah diluluskan ...". There is no mention anywhere in the said sanction as to the effective date of the sanction or that it commences as to any date which has been backdated. This court thus holds that the sanction does not have any retrospective effect and is effective only from the date of the letter from JIM ie, 8 September 2020.

[26] Following from my findings on the sanction and the effect of the same, I find that at the time of the warrant to act ie, 20 May 2020 there were two directors validly holding the position of a director in the respondent, being Lim and Lee, as Lee was only declared a bankrupt on 29 July 2020. I also find that on 1 September 2020 when Lim had executed the notice of appointment, there was no formal board resolution on the same nor was the sanction given to Lee to continue to act as a director of the respondent effective as at that date.

[27] I also hold that the matter before me can be differentiated from *Ulimas Sdn Bhd* (*supra*), as:

(i) there was only Lee who had signed as a director of the respondent on the warrant to act as opposed to the *Ulimas* case where the majority of the directors being two out of three had signed the warrant to act therein;

(ii) there is thus no question of the majority of the directors signing the warrant to act herein and accordingly the warrant to act cannot form the respondent's company resolution as there is no equivalent art. 109 as in

the *Ulimas* case which is contained in the respondent's articles which allows the act of the majority as being valid by reason wherein of art. 109 of the articles of association in the *Ulimas* which provides: "109. **A resolution in writing signed by a majority of the Directors for the time being in Malaysia shall be as effective** as a resolution passed at a meeting of the Directors duly convened and held, and may consists of several documents in the like form, each signed by one or more of the Directors"; (emphasis added)

(iii) even if there was a similar resolution in the articles of the respondent as in art. 109 of the *Ulimas* case, the same ie, the act of the majority as being valid, would in my considered view not be applicable as there is no issue of a majority of directors in a company such as the respondent where there are only two directors which will necessitate both directors signing a resolution of the company and in this matter, the warrant to act itself to form a resolution of the company; and

(iv) there has been no attempt by the respondent to ratify the appointment of the solicitors as seen by the lack of any company resolution from the respondent, whether formal or otherwise, in respect of the same.

[28] I further hold that the separate acts of Lee signing the warrant to act and Lim executing the notice of appointment, does not tantamount to a unanimous appointment by the board of the respondent company as any appointment of the solicitors, to constitute a resolution of the company, even if informally done and *albeit* without a formal written resolution, should in this court's view be (i) in writing; and (ii) signed or executed by the respondent's directors in accordance with the respondent's articles, which in this case before me being the two directors of the respondent. Anything short of the minimum requirements to constitute a document which could be considered as a resolution would in my view result in utter chaos, confusion and a continuous piece meal of documents in the management and/or decisions of a company which would result in a lack of certainty as to whether the document(s) is in fact a company resolution.

[29] I thus hold that the warrant to act dated 20 May 2020 cannot in the circumstances, be construed as a resolution in writing as it had not been signed by both the directors of the respondent and as such, the suit was not duly authorised by the Board and that the respondent in having failed to pass any resolution to appoint solicitors to act for the company or pursue any legal proceedings.

[30] This court hereby now declares that that Messrs NK Menon & Associates (solicitors) had not been duly authorised by the respondent to act on its behalf; and that all action taken by the solicitors purportedly for and on behalf of the respondent in this petition are null and void.

[31] This court therefore grants order in terms for encl. 20.